Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Retention by Broadcasters of	)	MB Docket No. 04-232
Program Recordings	)	
	)	

REPLY COMMENTS OF BROADCASTERS' COALITION

The Broadcasters' Coalition, comprised of Beasley Broadcast Group, Inc.; Citadel Broadcasting Corporation; Clarke Broadcasting Corporation; Entercom Communications Corp.; Fox Entertainment Group, Inc.; Galaxy Communications, L.P.; Multicultural Radio Broadcasting, Inc.; Radio One, Inc.; Sarkes Tarzian, Inc.; Viacom Inc.; and the Washington State Association of Broadcasters, by counsel, hereby replies to the comments on the Notice of Proposed Rulemaking in the captioned proceeding. [1]

I. THE RECORD DOES NOT SUPPORT THE PROPOSED RULE

The comments overwhelmingly agree that the proposal to require broadcasters to retain program recordings is "unnecessary, vastly overbroad, burdensome … and constitutionally suspect." [2] Literally hundreds of broadcasters opposed the proposed rule on grounds that it would impose significant costs and burdens but would not strengthen indecency enforcement or serve any other legitimate purpose. [3] Virtually none of these broadcasters has been subject to

[1] *Retention by Broadcasters of Program Recordings*, 19 FCC Rcd. 12626 (2004) ("Notice").

[2] Comments of the National Association of Broadcasters ("NAB") at 1. *See also* Comments of the Broadcasters' Coalition at i ("proposed new rule … addresses a phantom problem" and is an "exercise in regulatory overkill").

[3] *E.g.*, NAB at 9-20; Association of Public Television Stations ("APTS") at 3-5; Joint Comments of the Named State Broadcasters Associations ("State Broadcasters") at 6-8; Coalition of Small Broadcasters ("Small Broadcasters") at 1-3; National Public Radio ("NPR") at 4-9; Joint Comments of NCE Broadcasters ("NCE") at 3-5; Clear Channel Communications, Inc. ("Clear

any notice of apparent liability ("NAL") citing alleged indecency violations, and many state that they have never received a single complaint about the broadcast of allegedly indecent content. [4] These scores of broadcasters object to being forced to incur thousands – or even tens of thousands – of dollars in new costs to provide the Commission with a superfluous tool aimed at regulating what is, by any measure, the extremely rare occurrence of indecent broadcasts. [5]

Nothing in the record in this proceeding demonstrates that the proposed rule is needed to aid enforcement of the FCC's indecency rules. *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999. The comments favoring the requirement number in single digits, including those supporting the rule for reasons wholly apart from indecency enforcement. [6] Among the few commenters who support a proposed recording and retention requirement for the purpose espoused in the Notice – *i.e.*, regulating indecency – none offers any evidence or tries to demonstrate that existing enforcement mechanisms are hampered by an absence of program recordings. On the other hand, numerous submissions documented the fact that exceedingly few complaints are adversely affected by the absence of a recording. [7]

Channel") at 1-6; Intercollegiate Broadcasting System, Inc. ("Intercollegiate") at 4-7; Alaska Broadcast Communications *et al.* ("Alaska") at 7-8; Three Angels Broadcasting Network, Inc. ("Three Angels") at 2; Heritage Radio Broadcasters ("Heritage") at 8-10; WFCR-FM ("WCFR") at 1-3; Morgan Murphy Stations at 2; Prettyman Broadcasting Company ("Prettyman") at 1-2.

[4] *E.g.*, Comments of Metz, Inc. ("Metz") at 7; Sunbelt South Tele-Communications ("Sun Belt") at 2; Prettyman at 1.

[5] *E.g.*, Broadcasters' Coalition at 5-6 (out of eight billion minutes of broadcast programming aired each year, only a few are even subject to indecency allegations); Heritage at 4-5; Citadel Communications, L.L.C. at 4-6. *See also* NAB at 6-8 (incidence of assertedly indecent programming, and NALs issued for it, is "infinitesimal"); State Broadcasters at 2-4 .

[6] New America Foundation ("NAF") *passim*; Alliance for Better Campaigns, *et al.*, ("Alliance") *passim*.

[7] *E.g.*, Comments of NBC Universal, Inc. ("NBC") at 2-4; Joint Comments of Cosmos, *et al.* ("Cosmos") at 4-5; Harvard Radio Broadcasting Co., Inc. ("Harvard") at 7-8; Cohn and Marks LLP at 2-3. *See also supra* note 3.

At most, isolated commenters suggest the rule is necessary because the FCC "cannot expect consumer[s] to know that [indecent material] is going to happen" or for them "to tape every program." Comments of Morality in Media ("MIM") at 6. Some add that "[a]bsent a transcript or tape, the [FCC] is forced to make its initial decision based on a listener's or viewer's memory alone," and note the "fleeting nature of indecent broadcast[s]." Comments of United States Conference of Catholic Bishops ("USCCB") at 1. MIM and UCSSB fail to support these general assertions with any specific showing of hardship or impediment in pursuing indecency complaints due to lack of a recording and retention requirement. At the same time, the record shows that critics of broadcast programming have organized efforts to monitor broadcasts generally and to make tapes or transcripts available for those "caught off guard by a program" about which they wish to complain. [8]

Given the paucity of evidence to support the proposed rule, little more need be said to show that "the recording proposal is extraordinarily overbroad and needlessly punitive." NAB at 6. In addition, multiple constitutional analyses in the record show that "a recording requirement of the sort currently proposed poses substantial First Amendment issues," especially given "its chilling effect on speech." [9] The only constitutional defense offered in support of the proposal is hopelessly confused. *See* MIM, *passim*. For example, it erroneously suggests that "*Pacifica* was wrongly decided" to the extent it creates the "impression that indecent speech in the broadcast medium is protected by the First Amendment." [10] It also grossly mischaracterizes the FCC's

[8] Comments of the Broadcasters' Coalition at 11 & Exh. 2 at 2. *See also* Bill McConnell, *Your Money or Your License*, BROADCASTING & CABLE, Sept. 20, 2004 (describing the work of paid programming monitors).

[9] APTS at 2. *See also, e.g.*, NPR at 4-10; NAB at 20-26; NBC, *passim*; Clear Channel at 1-8; Broadcasters Coalition at 20-27.

[10] *Id*. at 1 (citing *FCC v. Pacifica Found., Inc.*, 438 U.S. 726 (1978)). *Compare Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I*") ("Broadcast

authority in this area, asserting that the Commission has the authority to adopt rules to the extent "there is no specific law prohibiting the Commission from requiring radio, TV and cable stations to retain program recordings." MIM at 5. However, the D.C. Circuit has made clear that just the opposite is true: "[t]he position … that the adoption of rules [affecting programming content] is permissible because Congress did not expressly foreclose the possibility … is … entirely untenable." *Motion Picture Ass'n of America, Inc. v. FCC,* 309 F.3d 796, 805-06 (D.C. Cir. 2002). As a consequence, the record in this proceeding lacks both a legal and factual basis for adopting a program recording and retention rule.

II. THE OBVIOUS UNDUE BURDEN PRESENTED BY A PROGRAM RECORDING AND RETENTION RULE CANNOT BE REMEDIED BY IMPLEMENTING IT IN A DISCRIMINATORY MANNER

The Commission must reject suggestions by some commenters that a recording and retention rule might be permissible if it applies only to broadcasters that some perceive as creating indecency "problems." Proposals to impose program recording and retention requirements selectively on broadcasters that have been subject to indecency complaints that did not lead to FCC action, that have received NALs that are not yet final, or that have raised constitutional defenses of their programming against indecency charges, as variously suggested by some commenters, [11] only compound the First Amendment infirmities already identified in this proceeding. Neither the record nor basic precepts of law permit the discriminatory imposi-

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material that is indecent but not obscene is protected by the first amendment[.]"). *See also* MIM at 4 ("the D.C. Circuit erred in [*ACT I*] … in stating that broadcast material that is indecent … is protected by the First Amendment"). *Compare Butler v. Michigan,* 352 U.S. 380 (1957); *United States v. 12 200-ft. Reels of Film,* 413 U.S. 123 (1973); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *United States v. Playboy Entmt. Group, Inc.*, 529 U.S. 803 (2000); *Reno v. ACLU,* 521 U.S. 844 (1997) (invalidating, respectively, indecency restrictions imposed on print media, film, mail, cable television, and the Internet).

[11] *See, e.g.*, Clear Channel at 7; Cromwell Radio Group, Inc. ("Cromwell") at 2; Sun-Belt at 3; Community Broadcasters Association ("CBA") at 2; Curators of the University of Missouri ("Missouri Curators") at 4; Hubbard Broadcasting, Inc. at 3-4.

tion of such burdens based on non-final NALs or other unadjudicated allegations of indecency violations. Indeed, the constitutional and factual problems explained in the Broadcasters' Coalition's initial comments and noted above undermine all proposals to create content-based or speaker-based exemptions from any regime of mandatory program recording and retention. [12]

The initial comments demonstrated that a recording and retention rule would have a profound chilling effect and could not survive statutory or constitutional scrutiny. [13] As a threshold matter, requiring broadcasters who merely receive NALs to record their programming amounts to imposing an additional penalty in advance of a final order. This would violate the prohibition in Section 504(c) against using an NAL "to the prejudice of the [recipient] unless … the forfeiture has been paid, or … a court … has ordered payment … and such order has become final." 47 U.S.C. § 504(c). Such a rule also would violate the "fundamental axiom" that "speech may not be suppressed nor any speaker punished unless" there has been "final determination that [the] specific" speech in question presents a violation. *Thomas v. Board of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1048 (2d Cir. 1979) (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1953)).

Focusing the adverse impact of a recording and retention requirement on only broadcasters that are targets of indecency allegations or that receive NALs that have not resulted in a final order also does nothing to ameliorate the proposal's legal deficiencies and, if anything,

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[12] Program recording and retention regulations targeted only at adjudicated violators would be another constitutionally impermissible content- and speaker-based distinction.

[13] Broadcasters' Coalition at 20-27 (citing, *inter alia*, *Community-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (*en banc*); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Time Warner Entmt. Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001)). *See also supra* note 9.

only exacerbates the lack of constitutional and evidentiary support for the rule. Applying the rule to a smaller class of broadcasters does not make it any less burdensome; it only concentrates the burdens on a selected group of licensees. Such a discriminatory approach would not further the purported purpose of the program recording proposal. In most cases an NAL is issued for program content that is anomalous with – not representative of – content aired by the cited broadcaster. [14] Neither the Notice nor any of the comments indicates that receipt of an NAL is predictive of likely future offenses. Selective imposition of a recording and retention requirement thus poses the same equal protection problems that undermined the selective program retention requirements in *Community-Service Broadcasting*, where the Commission was unable to show a "governmental interest suitably furthered by the differential treatment." [15]

Constitutional considerations and FCC indecency enforcement history also preclude a program recording and retention rule that exempts categories of broadcasters based on their programming and/or identity. [16] Content- and speaker-based preferences of this kind, and the

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[14] *See, e.g.*, *Young Broad. of San Francisco, Inc.*, 19 FCC Rcd. 1751 (2004); *Edmund Dinis*, 17 FCC Rcd. 24890 (Enf. Bur. 2002); *State Univ. of N.Y.*, 13 FCC Rcd. 23810 (1998); *Three Eagles of Columbus, Inc.*, 15 FCC Rcd. 18902 (Enf. Bur. 2000); *Back Bay Broad., Inc.*, 14 FCC Rcd. 3997 (1999); *LBJS Broad. Co., L.P.*, 13 FCC Rcd. 20956 (1998); *Legacy Broad. of Detroit, Inc.*, 6 FCC Rcd. 3698 (1999); *Kansas City Television, Ltd.*, 4 FCC Rcd. 6706 (1989) (all involving broadcasters that received but a single published NAL).

[15] 593 F.2d at 1122 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). *See also id*. at 1124 (Bazelon, J., concurring) ("however strong th[e First Amendment] challenge is," a selective recording and retention requirement "violates the Equal Protection guarantee of the Fifth Amendment … [b]ecause [it] not only 'touches upon' fundamental First Amendment freedoms, but does so by classifications formulated explicitly in terms of the content of speech").

[16] There can be no constitutional basis on which the FCC can "limit the applicability of any retention requirement to … broadcasters that routinely challenge … the restrictions on … indecent or profane programming," Missouri Curators at 3-4, as such a requirement would deprive broadcasters of their First Amendment right to petition for redress of grievances created by indecency enforcement. *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 419 (7th Cir. 1988) ("litigation is a method recognized by the Supreme Court … for advancing ideas and seeking redress of grievances … [a]nd even when litigation has private rather than public objectives, communications designed to acquaint [recipients] with their legal rights are within … the First

resulting content- and speaker-based regulatory burdens they create, are presumptively invalid. [17] Consequently, the Commission must reject proposals to exempt non-commercial stations, [18] educational broadcasters, [19] religious broadcasters, [20] public broadcasters, [21] "small" broadcasters (whether defined as small-market stations, small-market broadcasters, or broadcasters that are small businesses), [22] or formats that it is alleged are unlikely to draw indecency complaints. [23] Not only are all such content- and speaker-based distinctions impermissible, they would create separate equal protection violations that would render the proposed exemptions unconstitu-

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Amendment") (citing *NAACP v. Button* 371 U.S. 415, 429-31 (1963); *In re Primus*, 436 U.S. 412 (1978); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 5-6 (1964)). The same is true of any attempt to limit imposition of the rule only to "notorious programs," WFCR at 4, which poses the same pre-judgment problems cited in *Granville Central School District*, *supra* at 5. Indeed, some commenters would impose recording and retention "if a program is questionable in nature," based on no more than receipt of a complaint, even for shows the FCC has found not indecent. He's Alive Broadcasting Association at 1 (citing Buffy the Vampire Slayer). *Compare Complaints Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" on November 20, 2001*, 19 FCC Rcd. 15995 (2004) (dismissing indecency complaints).

[17] *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130, 133-34 (1992) (citing "heavy presumption against the validity of … ordinance" that "often [regulated] based on … content" and "[n]othing in the law or its application prevent[ed] official[s] from encouraging some views and discouraging others"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228, 232 (1987) (noting government's "heavy burden in attempting to defend its content-based approach" of "either singling out the press as a whole or targeting individual members" both of which "pose[d] a particular danger of abuse"). *See also Community-Service Broad.*, 593 F.2d at 1111-12 ("Application of the … recording requirement … [ ]on only programming of public importance" held to be "on its face Not content neutral").

[18] *E.g.*, NPR at 11-13; Educational Media Foundation at 1-4; Station Resource Group at 11.

[19] *E.g.*, Harvard at 8; Missouri Curators at 2; NCE at 5; Collegiate Broadcasters, Inc., at 8.

[20] *E.g.*, Three Angels at 3; Station Resource Group at 11; Garner Ministries, Inc. at 1.

[21] *E.g.*, APTS at 5-9; Nevada Public Radio at 2; Western States Public Radio, *et al*. at 9, 18.

[22] *E.g.*, Alaska at 14-15; Sun-Belt at 4; Heritage at 12-13; Small Broadcasters at 3-5; CBA at 2-3; Arso Radio Corporation at 3. *See also* Clear Channel at 7-8.

[23] *E.g.*, Alaska at 15-16; Cosmos at 5; Nevada Public Radio at 2; KBach at 1.

tional.[24] Similarly, there cannot be exclusions for songs, advertisements, or syndicated programming, on grounds that recordings of such content are retained centrally at their points of origin, as these exemptions, too, are content- and speaker-based.[25]

As the Broadcasters' Coalition explained in its initial comments, the Commission should reject a program recording requirement for all broadcasters. Indecency allegations – and FCC action on them – might as readily involve news or public affairs, non-commercial programming, educational stations, or any other of the proposed exemptions, as does programming found anywhere else on the broadcast dial.[26] Indeed, as the cited cases indicate, the Commission never has distinguished between indecency that may arise in a news or public affairs context, a non-commercial context, or occurring in any other type of programming.

III. POTENTIAL OTHER USES FOR PROGRAM RECORDINGS CANNOT SERVE AS A BASIS FOR ADOPTING THE PROPOSED RULE

The fact that a program recording and retention requirement might theoretically prove useful for purposes unrelated to enforcing Section 1464 provides no basis for adopting such a

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[24] *See supra* note 15 and accompanying text. *See also Action for Children's Television v. FCC*, 58 F.3d 654, 668-69 (D.C. Cir. 1995) ("*ACT III*") (discriminatory application of indecency rules struck down where "Congress … failed to explain what, if any, relationship the disparate treatment of public stations [bore] to the compelling Government interest").

[25] *E.g.*, Clear Channel at 7-8; Cromwell at 2-3; CBA at 2; Small Broadcasters at 3; Barnstable Broadcasting, Inc. at 6-7.

[26] *See, e.g., Pacifica*, 438 U.S. 726; *Young Broad.*, 19 FCC Rcd. 1751; *KBOO Found.*, 16 FCC Rcd. 10731 (Enf. Bur. 2001); *Regent Licensee of Flagstaff, Inc.*, 15 FCC Rcd. 17286 (Enf. Bur. 2000); *SUNY*, 13 FCC Rcd. 23810; *Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, 9 FCC Rcd. 7638 (1994); *Dontron, Inc.*, 6 FCC Rcd. 2560 (Aud. Serv. Div. 1991); *Peter Branton*, 6 FCC Rcd. 610 (1991); *Pacific and Southern Co., Inc.*, 6 FCC Rcd. 3689 (MMB 1990); *King Broad. Co.*, 5 FCC Rcd. 2971 (1990); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703 (1987); *Trustees of the Univ. of Pa.*, 57 FCC.2d 782 (1975); *WGBH Educ. Found.*, 69 FCC.2d 1250 (1978); *Jack Straw Memorial Found.*, 29 FCC.2d 334 (1971). For this, among many other reasons, members of the Broadcasters' Coalition believe that the Commission's indecency enforcement policies are overly broad and unconstitutional. However, we do not address these substantive questions in this proceeding.

rule. It may be the case that "local broadcasters are a primary source of political information for the American public" such that program recordings could aid "scholarly studies of mass media." NAF at 1. The recordings conceivably might be used by "[a]ctivist organizations and researchers" with the self-assigned "mission" of "investigat[ing] whether the media are living up to their public interest obligations." Alliance at 1. Similarly, program recordings may or may not be referred to in rulemakings unrelated to indecency or any other FCC enforcement regime. *See* USCCB at 2. But there is no reason to debate whether and/or the extent to which the recordings might benefit research and advocacy groups, because imposing a program recording and retention requirement in support of these objectives could neither surmount the First Amendment shortcomings of a rule that threatens significant costs and chills speech, nor provide a separate basis for the rule's adoption.

Given its well-documented burdens, adopting the proposed rule for reasons such as those advocated by NAF, Alliance and USCCB could not withstand constitutional scrutiny. Just as with the Notice's proposal to adopt the rule for purposes of indecency enforcement, adopting it in order to serve scholarly or advocacy pursuits must be subjected to heightened First Amendment scrutiny. *See* Broadcasters' Coalition at 24 (citing *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189-90 (1997); *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Accordingly, if the FCC adopted recording and retention mandates for the reasons proffered by these commenters, it still would have to show that the rule directly and materially serves an important governmental interest, that it is narrowly tailored, and that it will restrict no more speech than necessary. *Id.*

But the imposition of onerous recording and retention requirements for the purposes espoused by NAF *et al.* would not serve any *government* interest – let alone one that is substantial – but rather would inure only to the benefit of those private parties, and that is insufficient to support legal mandates that restrict speech. *See, e.g., Procter & Gamble Co. v. Bankers Trust*

Co., 78 F.3d 219 (6th Cir. 1996). Even if the Commission could invent a purported government interest in advancing the private pursuits advocated these commenters, the complete absence of legislative or administrative findings that show a need for, or the efficacy of, program recording and retention requirements for purposes of scholarly research or advocacy precludes the government from justifying the rule under the First Amendment. *E.g.*, *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (noting importance of findings to support speech restriction); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) (invalidating statutory provisions where "congressional record contain[ed] no legislative findings that would justify … concluding that there is no constitutionally acceptable less restrictive means" of achieving government's interest); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 645 (1994) (citing "unusually detailed statutory findings"). A recording and retention rule adopted for the non-regulatory purposes cited by NAF and Alliance also would suffer the same First Amendment tailoring infirmities as a rule adopted in pursuit of indecency enforcement. *See* Broadcasters' Coalition at 24-27. *See also supra* note 9.

IV. CONCLUSION

Comments submitted in the record overwhelmingly demonstrate that the Commission should reject the proposed taping and retention requirement as unnecessary, excessively burdensome, and inconsistent with the First Amendment. There a no framework consistent with the Constitution under which the Commission could selectively apply the new rule to certain broadcasters but not others. Similarly, there are no non-regulatory justifications for imposing the burden and chill threatened by the proposed rule sufficient to overcome its constitutional (and other) deficiencies. The proposal should be summarily rejected in full.

Respectfully submitted,

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